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No. 76-1835

In the Supreme Court of the United States

OCTOBER TERM, 1977

IKE SLODOV, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinions of the bankruptcy judge (Pet. App. A22–A42) and the district court (Pet. App. A13–A20) are not officially reported. The opinion of the court of appeals (Pet. App. A1–A12) is reported at 552 F. 2d 159.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 1977 (Pet. 2). The petition for a writ of certiorari was filed on June 23, 1977, and was granted on October 3, 1977 (A. 59). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Section 6672 of the Internal Revenue Code of 1954 makes personally liable for taxes "[a]ny person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof * * *."

The question presented is whether petitioner is personally liable under Section 6672 for unpaid taxes of three of his corporations withheld from employees' wages prior to petitioner's assumption of control of the corporations, where the corporations thereafter acquired funds sufficient to pay the taxes but petitioner willfully failed to pay them over to the government.

STATUTES INVOLVED

The pertinent provisions of Section 6671, 6672 and 7501 of the Internal Revenue Code of 1954 (26 U.S.C.) are set forth in the Appendix, *infra*, pp. 1A–2A.

STATEMENT

1. On January 31, 1969, petitioner purchased the stock of three corporations engaged in the food vending business, Tas-Tee Catering, Tas-Tee Vending and the Charles Corporation. Petitioner was in absolute control of these corporations and their disbursements from January 31, 1969 through July 15, 1969, except

for the two-week period from May 23 through June 4, 1969 (Pet. App. A2; A4).

During the purchase negotiations, the sellers represented to petitioner that the corporations had sufficient funds to pay all of their existing tax obligations and other debts. On February 1, 1969, petitioner sent to the Internal Revenue Service the corporations' Federal Insurance Contributions (social security) and withholding tax returns for the last quarter of 1968 and Tas-Tee Catering's returns for the second quarter of 1968. These returns were accompanied by corporate checks for payment of the liabilities (Pet. App. A2). On February 3, 1969, petitioner discovered that the corporations did not have sufficient funds in their accounts to cover the checks and he immediately stopped payment on them (Pet. App. A2).

While under petitioner's control the corporations continued to have current operating receipts of approximately $130,000 per week (A. 14). Petitioner used these funds in part to pay a small portion of the outstanding employment taxes due the government (A. 13–14). However, the evidence is undisputed that during the period of petitioner's control, the corporations had large sums of money which they used to pay employees, rent, utilities and other creditors, to purchase supplies, and to meet the other day-to-day expenses (Pet. App. A9, A41–A42; A. 6–8, 14). Thus, for example, during the period of petitioner's control, the corporations paid $100,000 to discharge a loan they owed to Metropolis Industries (A. 9).

In July 1969, petitioner withdrew from the direction of the corporations' business. Subsequently, petitioner instituted a proceeding for a Real Property Arrangement under Chapter XII of the Bankruptcy Act. The Internal Revenue Service filed in the proceeding a claim for $313,740 owed under assessments made pursuant to Section 6672 of the Internal Revenue Code for the second and fourth quarters of 1968 and the first through the third quarters of 1969 (Pet. App. A36).

The bankruptcy judge found that petitioner was not responsible for withholding taxes collected prior to February 1, 1969 (Pet. App. A34). While he further found that petitioner was the person responsible for the collection of such taxes from February 1 to July 15, 1969, he concluded that petitioner's failure to withhold and pay over taxes was not willful within the meaning of Section 6672. He therefore concluded that petitioner was not personally liable for any of his corporations' unpaid withholding tax liabilities (Pet. App. A37).

The district court affirmed the bankruptcy judge insofar as he held that petitioner was not liable for the withholding taxes for periods prior to February 1, 1969, but ruled that petitioner was liable for the unpaid withholding taxes after that date (Pet. App. A17–A19).

2. The court of appeals reversed both rulings. It concluded that petitioner was required to account for and pay over taxes collected prior to February 1, 1969.

Since petitioner was aware of the unpaid taxes and possessed the power and responsibility to pay them, his subsequent use of corporate funds to prefer other creditors over the government rendered him liable for the taxes under Section 6672 for the period prior to January 31, 1969[1] (Pet. App. A1–A12).

The court of appeals recognized that the amount of withheld taxes constitutes a special trust in favor of the United States. See 26 U.S.C. 7501. It rejected petitioner's argument that he was not liable for unpaid withholding taxes for periods prior to the time that he assumed control over the corporations because there were no unencumbered corporate funds on hand at that time. The court stated: "When the corporation came into possession of funds after * * * [petitioner] acquired control, these funds were impressed with a trust to the extent of the corporation's obligations for previously unpaid withholding income taxes and employees' share of social security taxes. Though created before * * * [petitioner's] control of the corporation began, these obligations continued after that date, and he was clearly the person responsible for

[1] The court of appeals' decision that petitioner was not liable for withholding taxes for the period February 1 through July 15, 1969 rested upon an agreement between the corporations and the Internal Revenue Service to apply any payments to current liabilities (see Pet. App. A4–A7). Since the question upon which certiorari has been granted involves petitioner's liability only for the period prior to February 1, 1969, the portion of the court of appeals' opinion captioned "SLODOV'S APPEAL" (Pet. App. A4–A7) has no bearing upon the issue before the Court.

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paying them when funds became available" (Pet. App. A11).

SUMMARY OF ARGUMENT

A.

Sections 3102(a) and 3402(a) and (d) of the Internal Revenue Code of 1954, as amended, require every employer to withhold federal income and social security taxes from the wages of his employees. Section 7501 provides that the withheld taxes constitute a special trust fund in favor of the United States. If an employer withholds a tax but fails to pay it over to the United States, the employee is nevertheless credited with having paid the tax and the government will not require any additional payment from the employee. Thus, unless the government has recourse against the person responsible for the collection and payment of the tax, the revenues would be put in jeopardy.

Section 6672 of the Code gives the government recourse against the responsible person. It imposes personal liability upon "[a]ny person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax * * *." The thrust of the statute is to impose personal liability upon those persons whose conduct results in the failure to pay withheld taxes. In the typical case, as here, the statute is used as a collection

device against officers of a bankrupt corporation for the taxes withheld from its employees' wages.

The court of appeals correctly held that petitioner was personally liable under Section 6672 for the unpaid taxes withheld prior to his assumption of control of the corporations. When petitioner took over the corporations which thereafter came into possession of funds, he was required to use those funds to discharge the corporations' unpaid withholding tax liabilities. Since petitioner was aware of the unpaid taxes and possessed the power and responsibility to pay them, his preference of other corporate creditors over the government rendered him liable for the tax under Section 6672.

B.

1. The language of the statute fully supports the imposition of personal liability against petitioner. After January 31, 1969, when petitioner was in control of the corporations, he was a "person required to collect, truthfully account for, and pay over" the taxes of the corporations. When he thereafter failed to pay over to the government the taxes his corporations previously had withheld from their employees, he became liable for those taxes under Section 6672 because, as a person that the statute covered, he failed to comply with one of its obligations, *i.e.*, that he "truthfully account for and pay over such tax[es]."

Petitioner argues that the Section 6672 liability for unpaid withholding taxes does not attach with respect

to taxes withheld from employees' wages prior to his assumption of control of the corporations. He relies upon the statutory language—"person required to collect, truthfully account for, *and* pay over any tax" (emphasis supplied)—and argues that he was not required to perform all three of these functions with respect to the tax dollars withheld prior to his assumption of control of the corporations.

But petitioner's reading of Section 6672 is not only inconsistent with the basic policy of the statute but is incorrect. The statute does not condition personal liability upon the responsible officer's performance of three enumerated functions with respect to specific tax dollars during a particular quarter. To the contrary, the statute simply identifies for potential liability the person who, at a given point in time, is required to perform all three functions of collection, accounting, and payment, and who willfully fails to discharge any one of those functions. Since petitioner was a "person required to collect, truthfully account for, and pay over any tax" and willfully failed to "pay over such tax[es]," he is personally liable under Section 6672.

2. Petitioner's reading of the statute would undermine the "basic purpose [of Section 6672 which] is the protection of governmental revenue * * *." *Monday* v. *United States*, 421 F. 2d 1210, 1216 (C.A. 7), certiorari denied, 400 U.S. 821. If petitioner were correct, a successor officer, whose conduct results in the non-payment of withholding taxes, could disclaim responsibility for such taxes on the ground that he was not in control at the time they were withheld, and

neither the predecessor nor the successor officer would be liable under Section 6672. Given the statutory purpose of preventing the unnecessary loss of tax revenues, there is no justification for the result petitioner urges. Indeed, to conclude otherwise would enable a successor officer deliberately to ignore the corporation's past withholding tax obligations without fear of the sanction of personal liability.

Here, the evidence is undisputed that during the period of petitioner's control the corporations came into possession of large sums of money which it used to pay debts and expenses. Hence, the facts of this case fully support the application of the rule that we urge with respect to Section 6672, *i.e.*, that a person who assumes control of a corporation, knows of its unpaid withholding taxes, and thereafter uses funds that came into the corporation's possession to prefer other creditors over the United States, is personally liable for the unpaid taxes.

ARGUMENT

SECTION 6672 OF THE INTERNAL REVENUE CODE IMPOSES PERSONAL LIABILITY UPON AN OFFICER OF A CORPORATION FOR UNPAID TAXES WITHHELD FROM EMPLOYEES' WAGES PRIOR TO HIS ASSUMPTION OF CONTROL OF THE CORPORATION, WHERE THE CORPORATION THEREAFTER ACQUIRES FUNDS SUFFICIENT TO PAY THE TAXES BUT THE OFFICER WILLFULLY FAILS TO PAY THEM

A. INTRODUCTION

This federal tax case presents a question concerning the scope of the personal liability for unpaid with-

holding taxes imposed by Sections 6671(b) and 6672 of the Internal Revenue Code upon persons required to collect and pay over such taxes. As we have stated in greater detail in our brief in *United States* v. *Sotelo* (No. 76–1800),[2] the collection of income taxes by withholding at the source has been an integral part of the internal revenue laws since 1942. Sections 3102(a) and 3402(a) and (d) of the 1954 Code require every employer to withhold federal income and social security taxes from the wages of his employees. The importance of this method of collection is shown by the fact that withholding taxes on wages recently accounted for 83 percent of the total amount of individual income tax collections.[3]

In imposing the collection obligation and the liability for withheld taxes upon the employer, Congress recognized that employers might fail to set aside and pay over these taxes to the government. If a corporation proved unable to pay the taxes and went out of existence in a liquidating bankruptcy, the Treasury would suffer the loss because the employees from whose wages the taxes were withheld would still be credited with those amounts against their tax liability as if they had

[2] The question presented in *Sotelo*, which is set for oral argument in tandem with this case, is whether the liability imposed by Section 6672 is dischargeable in bankruptcy. While this case also arose in the context of a proceeding under Chapter XII of the Bankruptcy Act, petitioner does not contend that his liability under Section 6672 is dischargeable in bankruptcy. We are serving a copy of this brief upon counsel for the respondent in *Sotelo*.

[3] *Annual Report of the Commissioner of Internal Revenue*, p. 137 (1976).

been in fact paid to the government. *Dillard* v. *Patterson*, 326 F. 2d 302, 304 (C.A. 5); *Moore* v. *United States*, 465 F. 2d 514, 517–518 (C.A. 5), certiorari denied, 409 U.S. 1108; *Hartman* v. *United States*, 538 F. 2d 1336, 1340 (C.A. 8). Since the government credits the employees' accounts with the taxes withheld it necessarily obligates itself to pay social security benefits and income tax refunds to the employees even though it has not received the necessary taxes. Thus, when withholding taxes are not paid, the government potentially stands to suffer a twofold loss—first, by failing to receive taxes that are lawfully due, and second, by disbursing benefits on the assumption that the taxes necessary to fund those benefits have been paid.

Congress sought to protect against such losses by requiring that withheld taxes "shall be held to be a special fund in trust for the United States" (Section 7501, Appendix, *infra*, p. 2A) and imposing personal liability for those taxes upon those whose control of the financial affairs of a business entity requires them to collect and pay over taxes collected from third parties. Section 6672 of the Code gives the government recourse against those responsible for collection who breach their fiduciary obligation to maintain a special trust fund for the benefit of the United States. It provides that "[a]ny person required to collect, truthfully account for, and pay over any tax * * * who willfully fails to collect such tax, or truthfully account for and pay over such tax * * *"

shall be personally liable for the amount of the tax not collected and paid over. Section 6671(b) defines the statutory term "person" to include "an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee or member is under a duty to perform the act in respect of which the violation occurs."

The thrust of Section 6672 is to impose personal liability upon those persons whose conduct resulted in the failure to pay withholding tax obligations. See, *e.g., Mueller* v. *Nixon,* 470 F. 2d 1348 (C.A. 6), certiorari denied, 412 U.S. 949; *Spivak* v. *United States,* 370 F. 2d 612 (C.A. 2), certiorari denied, 387 U.S. 908. In the typical case, as here, the statute is used as a collection device against officers of a bankrupt corporation for the taxes withheld from its employees' wages. The appellate courts have recognized that "the Congress in enacting § 6672 was solely interested in protection of the revenue and intended that the trust funds be fully collectible from those responsible persons who caused the diversion * * *." *Spivak* v. *United States, supra,* 370 F. 2d at 616. Accord: *Monday* v. *United States,* 421 F. 2d 1210, 1216 (C.A. 7), certiorari denied, 400 U.S. 821; *Harrington* v. *United States,* 504 F. 2d 1306, 1311 (C.A. 1); *Cross* v. *United States,* 311 F. 2d 90, 94 (C.A. 4); *Moore* v. *United States, supra,* 465 F. 2d at 517; *Mueller* v. *Nixon, supra,* 470 F. 2d at 1350; *Sorenson* v. *United States,* 521 F. 2d 325, 328 (C.A. 9); *White* v. *United States,* 372 F. 2d 513, 516 (Ct. Cl.).

Two requirements must be met for liability under Section 6672 to attach to a particular person. First, the party assessed must be a person required to collect, truthfully account for, and pay over the tax. Second, his failure to collect or to account for and to pay over the tax must be willful. *Hartman* v. *United States,* 538 F. 2d 1336, 1340 (C.A. 8). The test whether a particular official of a business is a responsible person is whether he had control of the disbursements of the taxpayer, *i.e.,* whether "he had the final word as to what bills should or should not be paid, and when." *Wilson* v. *United States,* 250 F. 2d 312, 316 (C.A. 9). See also *Hartman* v. *United States, supra,* 538 F. 2d at 1340; *Haffa* v. *United States,* 516 F. 2d 931, 935–936 (C.A. 7).

"Willfulness" under the statute does not connote fraudulent intent or evil motive. It is sufficient if the failure to pay the withholding tax obligations was the result of conscious acts or omissions by the responsible person with knowledge of the existence of the corporation's obligations to make such payments. See *Monday* v. *United States, supra,* 421 F. 2d at 1216, and cases cited therein. Thus, if the responsible person uses corporate funds to pay creditors other than the United States and knows that such disbursements will reduce the corporation's cash below the level of the withholding tax liabilities owed to the government, he is personally liable for the taxes under Section 6672 if the corporation is unable to pay them. *Newsome* v. *United States,* 431 F. 2d 742, 748 (C.A. 5).

B. THE LANGUAGE AND PURPOSE OF SECTION 6672 DEMONSTRATE THAT IT IMPOSES PERSONAL LIABILITY UPON A CORPORATE OFFICER WHO WILLFULLY FAILS TO USE CORPORATE ASSETS TO PAY OUTSTANDING WITHHOLDING TAX OBLIGATIONS OF THE CORPORATION

Petitioner does not dispute the foregoing principles. Nor does he challenge the facts that he was a "person required to collect, truthfully account for, and pay over any tax" after February 1, 1969, and that he thereafter disbursed funds of his corporations to creditors other than the United States despite his knowledge that there were outstanding withholding tax liabilities due to the government. However, he argues that the Section 6672 liability for unpaid withholding taxes does not attach with respect to taxes withheld from employees' wages prior to his assumption of control of the corporations.

Petitioner relies upon the statutory language—"person required to collect, truthfully account for, *and* pay over any tax" (emphasis supplied)—and argues that he was not required to perform all three of these functions with respect to the tax dollars withheld prior to his assumption of control of the corporations.

According to petitioner, the imposition of liability in such a case would do violence to the terms of the statute by reading the first clause with the disjunctive "or" instead of the conjunctive "and."

Petitioner's reading of Section 6672 is not only inconsistent with the basic policy of the statute (see pp. 16–18, *infra*) but is incorrect.

1. After January 31, 1969, when petitioner was in control of the corporations, he was a "person required to collect, truthfully account for, and pay over" the withholding taxes of the corporations. When he thereafter failed to use monies that came into the possession of the corporations to pay over such taxes to the government, he became personally liable under Section 6672 because, as a person the statute covered, he failed to comply with one of its obligations, *i.e.*, that he "truthfully account for and pay over such tax[es]." The words "such tax" do not refer to the actual tax dollars that the responsible officer collected, but to "any tax imposed by this title," which includes the corporation's withholding tax obligations.

The obligation to truthfully account for and pay the tax is one unified act and the failure to perform either element of that act triggers personal liability. In the second clause of the statute, which lists the three obligations of a responsible officer, the conjunctive phrase "truthfully account for and pay over such tax" is framed by commas. By contrast, in the first clause of the statute, which defines a responsible officer in terms of his obligations, the three functions of collection, truthfully accounting for, and payment are each separated by commas. Petitioner's failure to pay the corporations' withholding taxes with funds that came into their possession was a failure "truthfully [to] account for and pay over such tax" within the meaning of the statute.

In sum, Section 6672 simply identifies for potential liability the person who, at a given point in time, is required to perform all three functions of collection, accounting, and payment, and who willfully fails to discharge any one of those functions so that taxes are not paid. The imposition of Section 6672 liability upon petitioner is compatible with a conjunctive reading of the first clause of the statute because he was a person "required to collect, truthfully account for, *and* pay over" his corporation's withholding taxes at the time he failed to pay them over.

2. The "basic purpose [of Section 6672] is the protection of governmental revenue. [Citations omitted.] It provides a remedy to prevent the unnecessary loss of tax funds by permitting the 'taxing authority to reach those responsible for the corporation's failure to pay the taxes which are owing.' " *Monday* v. *United States, supra,* 421 F. 2d at 1216, quoting from *United States* v. *Graham,* 309 F. 2d 210, 212 (C.A. 9).

Petitioner's reading of Section 6672 would frustrate the statutory purpose of protecting the revenue from the willful failure of responsible officers to pay over withholding taxes to the government. For example, suppose that responsible officer A withholds taxes from the corporation's employees during a particular quarter. A resigns his position at the end of the quarter and B succeeds to the control of the financial affairs of the corporation. Thereafter, B is required to pay over the withheld taxes to the government. Instead, however, he uses corporate funds to pay other creditors and fails to pay the corporation's tax liabilities.

On these facts, A was the person required to collect the taxes and B was the person required truthfully to account for and pay over the taxes to the government. Under petitioner's reading of the statute, however, neither A nor B would be personally liable for the taxes: A was only required to collect (*i.e.*, withhold) them and not account for and pay them over, and B was required only to account for and pay over the taxes. Under petitioner's theory, no one would be liable under Section 6672 because no corporate officer was required to perform all three functions with respect to the particular tax dollars withheld from the employees' wages.[4] As we have noted, the statutory language does not require such a bizarre result, which would enable a successor responsible officer deliberately to ignore the corporation's withholding tax liability without personal liability.[5]

[4] The error of petitioner's position is underscored by his inconsistency with respect to the example of a predecessor responsible officer who transmits withheld taxes to his successor, who in turn willfully uses the fund to prefer other creditors. In his petition (p. 8), petitioner suggested that the successor officer would be liable under Section 6672 in such a case but not where the trust officer failed to transmit the withheld taxes to his successor. But petitioner's reading of the statute would necessarily exculpate any responsible officer from liability for taxes collected by a predecessor, whether or not the predecessor turns over funds sufficient to cover the accrued tax liability.

[5] Contrary to petitioner's suggestion (Reply Br. [at petition stage] 2), the government's argument does not subject a successor responsible officer to the onerous choice of paying the withholding taxes or having the corporation terminate its business. Petitioner's risk as a successor responsible officer is precisely the same as that of his predecessor. If either of them had funds available to pay withholding taxes and preferred other corporate creditors, he is personally liable under the statute. Petitioner erroneously assumes that an insolvent corporation with unpaid withholding taxes should be permitted to continue its business under the aegis of a successor officer even at the cost of the government's tax claim.

At all events, "[i]t is the duty of this Court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance, but if this leads to an unreasonable result plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail." *Ozawa* v. *United States*, 260 U.S. 178, 194. Accord: *Holy Trinity Church* v. *United States*, 143 U.S. 457; *Helvering* v. *New York Trust Co.*, 292 U.S. 455, 464. The purpose of Section 6672 to protect the revenue by imposing liability upon persons responsible for failing to satisfy a corporation's withholding tax liability requires that the section cover petitioner's willful preference of other corporate creditors over the United States.[6]

Section 6672, however, does not give a successor officer that option. Once he takes control of the corporation and continues its business for his own benefit while knowing of the outstanding tax obligations, he assumes the same position as his predecessor. Thus, if the corporation receives any funds and the responsible officer uses them to prefer other creditors over the United States, he is personally liable under Section 6672.

[6] Petitioner errs in arguing (Br. 11–12) that Section 7501 does not sanction the creation of an impressed trust on after-acquired funds because it only refers to "the amount of tax so collected or withheld * * *." The trust fund concept of Section 7501 is not limited to the actual dollars withheld from employees' wages but covers any corporate assets equal to the amount of accrued withholding tax liabilities. If, as here, a responsible officer knowingly fails to use available corporate assets to pay withholding taxes, he has breached the "special fund in trust for the United States

3. The foregoing analysis is generally supported by the decided cases. In *Anderson* v. *United States*, 561 F. 2d 162 (C.A. 8), the court rejected a contention identical to that of petitioner that the personal liability imposed by Section 6672 did not cover taxes withheld before the responsible person, a bonding company acting as surety for the corporation's performance of a particular contract, took over control of the corporation. Citing and quoting from the decision below with approval, the court stated: "The liability extends to payment of taxes withheld *before* the bonding company took charge" (561 F. 2d at 166; emphasis supplied). Since it was undisputed that the bonding company, like petitioner, knew about the unpaid taxes and subsequently received funds which it used to prefer the corporation's other creditors over the United States, the court held that the bonding company was a "responsible person" under Section 6671(b) and was therefore liable for the unpaid taxes under Section 6672. Accord: *Stake* v. *United States*, 347 F. Supp. 823, 826–827 (D. Minn.); *Astleford* v.

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* * *." At all events, Section 7501, which was intended to protect the government's collection of taxes, cannot be read to reduce the personal liability imposed by Section 6672.

Thus the principle of Section 223(1), A.L.I., *Restatement Second of Trusts* (1959 ed.) that a successor trustee cannot be held liable for the breaches of trust committed by his predecessor, upon which petitioner relies (Br. 12), is irrelevant. Petitioner's preference of other corporate creditors over the United States was itself a breach of trust independent of the breaches petitioner's predecessors committed. Indeed, the rule of the *Restatement* supports our submission, since Section 223(2) provides that "[a] trustee is liable to the beneficiary for breach of trust, if he (a) knows or should know of a situation constituting a breach of trust committed by his predecessor and he improperly permits it to continue * * *."

United States, 75–1 U.S.T.C., par. 9464, decided May 5, 1975 (D. Minn.); *Rubin* v. *United States,* 380 F. Supp. 1176, 1179 (W.D. Pa.), affirmed without opinion, 515 F. 2d 507 (C.A. 3); *Louisville Credit Men's Assn., Inc.* v. *United States,* 73–2 U.S.T.C., par. 9740, decided September 29, 1970 (E.D. Ky.).

The only arguable exception to this consistent line of authority is *McCullough* v. *United States,* 462 F. 2d 588 (C.A. 5), upon which petitioner relies (Br. 8–9, 11). There, the court rejected Section 6672 liability for a corporate officer who assumed his position after the taxes in question had been collected and withheld and continued to serve in that capacity during a period in which certain funds came into the corporation's possession that would have been sufficient to discharge unpaid withholding taxes for prior periods. The court suggested that the government's position "would in effect, change the language of Section 6672 from 'person required to collect, truthfully account for, and pay over' to 'person required to collect, truthfully account for, *or* pay over'" (462 F. 2d at 590). As we have argued *supra,* pp. 15–16, petitioner was a "person required to collect, truthfully account for, and pay over" within the meaning of Section 6672.

The court below correctly recognized that the observations of the Fifth Circuit in *McCullough* with respect to the conjunctive versus the disjunctive readings of the statute were dictum that did not govern the resolution of that case. As the court of appeals here concluded (Pet. App. A8–A9), *McCullough* turned on the fact "that it was clear from the evidence that the continued operation for approximately six months of the tenure of R. F. McCullough

was at the will of a large factoring company which had security instruments covering substantially all the assets of the corporation and advanced funds for the operation only as itemized by specific voucher" (462 F. 2d at 590). Thus, the court in effect held that during the pertinent quarters McCullough did not have the authority to exercise the unfettered control of a responsible officer but was subject to the will of the factoring company. He was not a responsible officer.[7]

Moreover, the Fifth Circuit in *McCullough* specifically left open the question resolved against the officer in this case, *viz.,* "the liability of a person who becomes an officer responsible for the payment of withheld but not accounted for and not paid withholding and FICA taxes at a time when the corporation has funds from which the managing head of the corporation could discharge the defaulting corporation's trust obligation to the government and exercises his control to disburse such trust funds for other purposes" (462 F. 2d at 590). *McCullough* therefore does not reject our position in this case. It held "only that the government did not prove facts sufficient to establish the existence of such a fund at a time when R. F. McCullough was the managing official" (*ibid.*).

Here, in marked contrast, as the court of appeals stated, "[t]he evidence is undisputed that Tas-Tee

[7] We do not mean to suggest that a responsible officer may avoid Section 6672 liability during his tenure by obtaining credit for the corporation from a third party on the condition that the creditor have the power to determine how corporate funds are disbursed. See *Kalb* v. *United States,* 505 F. 2d 506, 510 (C.A. 2), certiorari denied, 421 U.S. 979.

Catering had in its possession during the period of * * * [petitioner's] control large sums of money which it used to pay debts and operating expenses" (Pet. App. A9). The facts of this case fully support the application of the rule that we urge with respect to Section 6672, *i.e.*, that a person who assumes control of a corporation, knows of its unpaid withholding taxes, and thereafter uses funds that come into the corporation's possession to prefer other creditors over the United States, is personally liable for the unpaid taxes.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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*The Solicitor General is disqualified in this case.

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 6671. RULES FOR APPLICATION OF ASSESSABLE PENALTIES.

(a) *Penalty Assessed as Tax.*—The penalties and liabilities provided by this subchapter shall be paid upon notice and demand by the Secretary or his delegate, and shall be assessed and collected in the same manner as taxes. Except as otherwise provided, any reference in this title to "tax" imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter.

(b) *Person Defined.*—The term "person", as used in this subchapter, includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

SEC. 6672. FAILURE TO COLLECT AND PAY OVER TAX, OR ATTEMPT TO EVADE OR DEFEAT TAX.

Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 for any offense to which this section is applicable.

SEC. 7501. LIABILITY FOR TAXES WITHHELD OR COLLECTED.

(a) *General Rule.*—Whenever any person is required to collect or withhold any internal revenue tax from any other person and to pay over such tax to the United States, the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States. The amount of such fund shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such fund arose.

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